

***Amicus curiae* in the WTO Dispute Settlement Procedure: A Developing Country's Foe?**

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The admittance of *amicus curiae* briefs in the *US-Shrimp/Turtle* dispute in 1998 stirred a debate among WTO Member States whether the dispute settlement procedure should be accessible for private individuals and entities. Developing countries firmly opposed the inclusion of *amici curiae* into the Dispute Settlement Understanding (DSU) and repeated their arguments frequently in cases leading to *amicus* submissions, fearing a further shift of power in favour of developed countries and changes in the nature of the dispute settlement system. The present article examines these concerns in light of the experience made with *amicus* submissions in 21 disputes. It will be argued that most of the fears expressed by developing countries are unfounded and often based on wrong assumptions. However, it will likewise be shown that concerns regarding the compatibility of the dispute settlement's confidential nature and the admittance of *amicus* briefs were legitimate and need to be addressed by the Dispute Settlement Body (DSB).

Key words: WTO, dispute settlement, *amicus curiae*, DSU review
Jel-Codes: K33, O19

1 Introduction

“Imagine how you'd feel if your organization managed to convince your ... state legislature ... to enact a decent law. Then a foreign government or corporation challenged the law as illegal under international trade rules. The next thing you know, a special trade court closed to the public could decide that the law should be eliminated or weakened. It can happen. It has happened. It is called the World Trade Organization.”

(FRIENDS OF THE EARTH 2005, p. 4)

The problem, here presented in a dramatic manner by the global environmental organization FRIENDS OF THE EARTH, is as old as the World Trade Organization's (WTO) dispute settlement procedure: representatives of the civil society challenge it as secretive and unresponsive to social concerns. As multilateral trading standards increasingly collide with different countries' legislation, nongovernmental organizations (NGOs) demand the possibility to defend a State's public choices before the panels and the

Appellate Body (AB). A first step towards what some might term a more open and accessible WTO took the latter in its revolutionary ruling in *US-Shrimp/Turtle*: private individuals and entities now may express their opinion on a case as *amici curiae*.

The European Communities (EC) as well as the United States (U.S.) welcomed the AB's decision, whereas developing countries feared to be put at a disadvantage in comparison to potential *amici*. In view of the twenty-one cases which have reached either a panel or the AB and which caused external parties to file an *amicus* brief, this paper inquires to what extent the fears of developing countries have been justified and whether *amici curiae* are indeed inimici of developing countries. After covering in the first two chapters the legal background and the reasons forwarded in the debate for and against *amici*, the focus lies on the analysis of the relevant disputes and the lessons that can be drawn from them. Thereby this paper contributes to the current debate firstly by giving an overview of all *amicus* cases and reviewing them from a developing country's perspective. Secondly and more importantly, Chapter V analyses concerns of developing countries relating to power or systemic issues, and shows why they were or were not confirmed in the past cases.

2 *Amicus curiae* at the WTO: A Short Legal Introduction

2.1 *Amicus curiae* Defined

Amici curiae, literally 'friends of the Court', functioned in Ancient Rome as an *aide mémoire* to the judges who did not dispose of today's means of information gathering (UMBRICHT 2005). Nowadays mainly a procedural feature of common law courts, notably of the U.S. Supreme Court, *amicus* briefs are still filed by a private person or entity not involved in the respective dispute (UMBRICHT 2005). But instead of acting as a neutral party only interested in a just outcome, today's *amici curiae* try to highlight factual or legal aspects associated with their specific concerns or interests. MAVROIDIS formulated this trait of *amici* more drastically by stating that 'many friends of the court are rather friends for themselves', who 'do not care for the truth' and merely 'want to sell a message' (MAVROIDIS 2002). Or as Supreme Court Justice Arthur Goldberg put it:

"A traditional function of an *amicus* is to assert an interest of its own, separate and distinct from that of the [parties], whether that

interest be private or public. It is customary for those whose rights [depend] on the outcome of cases ... to file briefs *amicus curiae*, in order to protect their own interests."¹

Thus this procedural feature reflects the simple truth that not all those affected by a ruling enjoy *locus standi*, but might – if a case is of major interest to the wider public, and external parties could make a valuable contribution² – be granted a means to voice their point of view as *amici*. Other than third parties, though, potential *amici* do not have to prove that their right or protected interest will be affected by the decision (RAZ-ZAQUE 2001).

2.2 *Amicus curiae* Briefs in the Panel Procedure

In contrast to international judicial bodies like the European Court of Human Rights or the Inter-American Court of Human Rights,³ the lower and higher instance in the WTO's dispute settlement were long termed courts 'with no friends'⁴; no provision of the Dispute Settlement Understanding (DSU) nor of the Working Procedures of Appellate Review explicitly mentions *amicus* briefs. It was only due to the submission of two *amicus* briefs in the *US-Shrimp/Turtle* case that the panel addressed the question whether NGOs shall gain, albeit indirect, access to the proceedings. While the panel saw itself only competent to consider *amicus* briefs incorporated in a party's submission,⁵ the AB ruled that pursuant to Art. 13 and Art. 12.1 DSU panels were permitted to accept unsolicited information and advice.⁶ This broad construction of the panel's authority to 'seek' information in light of Art. 11 DSU, the duty to assess a matter objectively, has been confirmed by its subsequent practice to accept briefs filed timely, i.e. not after the deadline for the parties' rebuttal submission and not after the second substantive meeting of the panel with the parties (PALAMETER 2004). It has to be added, however, that the consideration of *amicus* briefs amounts only to a right of the panel and not of the *amici* themselves (STOIBER 2004).

1 Emphases by the author (SHELTON 1994).

2 Cf. for instance the US Supreme Court Rules of Practice and Procedure, Rule 37.1.

3 The practice of international courts with regard to *amicus* briefs has been assessed by (MARCEAU 2001 and SHELTON 1994).

4 CIELL: (ZONNEYEN 2001)

5 Panel Report *US-Shrimp/Turtle*, para. 3.129; also (PALAMETER 2004).

6 AB Report *US-Shrimp/Turtle*, paras. 105–108.

2.3 *Amicus curiae* Briefs in the Appellate Procedure

The last point is also valid for *amicus* briefs reaching the AB: in US-Lead and Bismuth II the AB held that entities filing a brief had no right to its consideration, while briefs included in a party's submission would be regarded as an integral part thereof.⁷ The judges saw their own authority to accept briefs not established in Art. 13 DSU, as this provision is only applicable for the panel proceedings,⁸ but in Art. 17.9 DSU. Deriving from this provision a 'broad authority to adopt procedural rules',⁹ the AB assumed its legal authority to accept and consider helpful briefs. Meanwhile, it has extended this competence to briefs originating from private individuals as well as Member States which do not participate as third parties in a dispute.¹⁰

Anticipating considerable interest of external parties, the AB deviated from the abovementioned ruling in EC-Asbestos by establishing a so-called Additional Procedure which set formal requirements for *amicus* briefs (WEISS 2004). Adopted solely for the purpose of that appeal, these complementary rules were, according to the AB, legally grounded in paragraph 16 of the Working Procedures (Appellate Review), which authorises the WTO's higher instance to fill procedural *lacunae*.¹¹

2.4 Legal Questions Unanswered

Already the AB's interpretation of Art. 13 DSU has not withstood the scrutiny of legal scholars, who termed it as 'artistic' (MAVRKIDIS 2002) and contradictory to the DSU: the AB admonished panels to consult the parties concerning a possible admittance of briefs, although Art. 13 allows panels to seek information independently, as long as they do not contact experts or entities under a party's jurisdiction (STOBER 2004). Likewise, the AB's assumption of a 'broad procedural authority' and the establishment of an Additional Procedure have been criticised as not pertaining to such a substantial question as participatory rights (WEISS 2001). The de-

7 AB Report US-Shrimp Art. 21.5, para. 76.

8 According to STOBER there does exist a branch of legal opinion viewing Art. 13 as a basis for *amicus* briefs before the AB. However, since Art. 13 does not distinguish between legal and factual information it can only be construed as a provision applicable for panels, as only legal questions are to be considered on appeal.

9 AB Report US-Lead and Bismuth II, para. 39.

10 Report of the AB EC-Sardines, para. 164. Cf. also Chpt. 4.6.

11 AB Report EC-Asbestos, paras. 50–51.

nunciation of the AB's rulings on *amicus* briefs as an overstretch of its mandate and illegitimate judicial activism has become even louder with its acceptance of a brief filed by a Member State: the alleged misconstruction of the relevant provisions resulted according to critics in a circumvention of third party obligations.¹²

In sum, the legal debate boils down to the question on whether the construction of the mentioned provisions has been justified or whether *amici* could only be admitted after an amendment to the DSU by the Member States. However, as long as the problem cannot be resolved in negotiations, *amicus* briefs have to be accepted as part of the WTO's procedural reality: as the two judicial bodies' practice has shown, they de facto follow a stare decisis (Steinberg 2004), thus rendering *amicus* briefs a customarily accepted procedural means.

3 Friends and Foes: The *amicus curiae* Debate

3.1 Proponents: Towards Transparency and Inclusiveness

Amici curiae are mainly seen as 'friends' by developed countries, like the European Communities which actively try to promote the admittance of external submissions: taking into account the need for a DSU reform as established at the end of the Doha conference in 2001, the EC proposed an amendment to the Dispute Settlement Body (DSB) memorandum. Therein it claimed that it was no longer necessary to debate whether *amicus curiae* briefs may be accepted by the DSU courts, but how to effectively discipline them as an established instrument of law (DiStefano 2003). Art. 13^{bis} was crafted as a broad interpretation of Art. 13 DSU and it was intended to institutionalise the Additional Procedure, adopted by the AB solely for EC-Asbestos. Similarly, the first advocate of *amicus curiae* at the WTO, the United States (BARONCINI, 2003), also forwarded a proposal to enhance transparency by allowing external entities to voice their concerns (ZIMMERMANN 2004).

Although both dampened their support for *amicus* briefs during the reform discussions, they proved their general endorsement in the disputes to come.¹³ Their positive attitude was partly due to the pressure exercised

12 See below Chpt. 3.3 and 4.6.

13 See below Chpt. 4.

by national NGOs, but, more importantly, rooted in their experience with *amici* at *inter alia* the European Court of Human Rights or the U.S. Supreme Court which made them aware of potentially positive effects *amicus* interventions.¹⁴

Above all, they would grant representatives of civil society access to the dispute settlement, which would partly fulfil often voiced demands for responsiveness to social and environmental concerns: *amici* can confront the Court with the broader dimension of its decisions and thus, as MAVROIDIS (2002) put it:

“constitute an opportunity for any given court ... to see, through the submitted briefs, its role in the society within which it operates.”

At the international level, this becomes all the more relevant as the gap is wider between possible participants to a dispute and those affected by it (HERRÁNDEZ-LÓPEZ 2001; UMBRIGHT 2005). In the WTO context this is even aggravated by the fact that only Member States enjoy *locus standi*: these might not be interested in representing the opinion of minorities or social interests (UMBRIGHT 2005), and in some cases could even refuse to enter a dispute in order to avoid economic disadvantages.

3.2 Opponents: Questions of Power and Beyond

In spite of these potential advantages linked to *amicus* briefs, the response of developing countries to the EC proposal proved to be very scant: all of them manifestly refused external submissions.¹⁵ This reaction was hardly surprising, since major developing countries like India had already during and in the aftermath of the US-Shrimp/Turtle dispute opined that the WTO's judicial bodies were incompetent to consider or even accept *amicus* briefs.¹⁶ Accordingly, reform proposals launched by coalitions of developing countries like the African Group aimed at restricting the rights of panels and AB in their handling of briefs (ZIMMERMANN 2004).

The arguments forwarded against *amici* are partly of legal and systemic nature, starting by the simple fact that the term '*amicus curiae*' is nowhere

mentioned in the DSU, which signifies that the now advocated openness had historically never been intended by the Member States (UMBRIGHT 2005). That conclusion seems to opponents all the more compelling when one considers the imbalance between Members and external parties, as it was created by the jurisprudence: while NGOs could file their briefs without meeting further requirements, Member States could do so only if they had first acted as third parties before the corresponding panel and fulfilled the obligations hereto (MAVROIDIS 2002; UMBRIGHT 2005). Ultimately, it has been argued, external interference would disturb the intergovernmental character of the WTO (DSB 2003a).¹⁷

Moreover, developing countries not only feared an asymmetry of rights, but also of resources and power: most affluent NGOs, think tanks and business associations are located in Western countries, which, assuming congruent interests between an entity and its home State, already puts Members at a disadvantage which do not dispose of these social resources (ZIMMERMANN 2004). Similarly it was argued that a developing and especially a least developed country's (LDC) limited resources would never allow it to respond properly to the deployment of briefs, communications and other actions carried out by a counterpart's friends of the court¹⁸ – an allusion to the so-called 'floodgate argument'.¹⁹

3.3 A Crumbling Coalition: The Cases of Jordan and Morocco

During sessions of the Dispute Settlement Body, developing countries repeatedly defended these arguments, thereby signalling that a compromise could hardly be reached on the *amicus curiae* issue.²⁰ Yet the developing countries' opposing coalition early started to crumble, as the example of the Kingdoms of Jordan and Morocco proves: although the former also feared *amicus* briefs to be a financial burden for participating developing countries and LDCs (DSB 2003b), the Kingdom took – and still takes – a more open stance towards external parties. Stressing that it would counter developing countries' interests to leave the issue unresolved and to block any compromise (DSB 2003b, 2003c), it launched its own proposal

¹⁷ An argument often raised in a special session of the DSB 2003a (TN/DS/M/5).

¹⁸ Quoting from the Minutes WTO Doc. WT/GC/M/60 of 23 January 2001 (MAVROIDIS 2002; UMBRIGHT 2005).

¹⁹ In the 1972 Namibia proceedings, the registrar refused an external application, stating that the court would be “unwilling to open the floodgates to what might be a vast amount of proffered assistance” [1972 ICJ Pleadings (2 Legal Consequences), para. 639] (SHELTON 1994).

²⁰ This was confirmed at, *inter alia*, the special session of the DSB on 13 November 2003 (TN/DS/M/11).

¹⁴ For an overview of the *amicus* practice at international Courts, including references to the U.S. experience (MERCEAU 2003 and SHELTON 1994).

¹⁵ TN/DS/M/6.

¹⁶ See below Chpt. 4.

that should meet the demands for more openness and at the same time accommodate the most pressing concerns: it not only foresaw the admittance of *amicus* submissions, but also the set-up of a fund,

“with the aim of remitting any costs or expenses that may be incurred by a developing or a least-developed country Member in reviewing, analyzing and/or responding to issues raised in an unsolicited *amicus curiae* brief.”²¹

Jordan further underlined its open attitude by implementing a Free Trade Agreement with the United States, whereby it signed a complementary *Memorandum of Understanding*: the latter includes a clause stating that *amicus* briefs shall be accepted and considered by the panel ruling on disputes concerning their Agreement.²² In a Joint Statement on WTO Issues they even agreed that in bilateral disputes before a WTO panel *amicus* submissions should also be admitted.²³

A second developing country demonstrated its positive opinion on *amicus* submissions in a more spectacular way – namely by becoming an *amicus curiae* itself: as it could not contribute to the appeal in EC-Sardines as a third party, Morocco filed a brief to the AB.²⁴ While the decision of the AB to accept the submission rendered the argument of unequal rights between external parties and Member States void, it nonetheless caused a controversial debate among the other Members.²⁵ Only Morocco supported the AB's ruling, declaring that it had merely helped the Kingdom to protect its interests (COVELLI 2003).

4 *Amici curiae* vs. Developing Countries? – The Case Law

4.1 Overview 1998-2005: *amici* in Twenty-One Disputes

“Much Ado About Nothing” termed (MAVROIDIS 2002) the concerns expressed by the Member States against the admittance of *amicus* briefs. Considering the experience gathered in the meantime, one is tempted to agree at least regarding the matter's quantitative dimension: since the

21 TN/DS/W/53.

22 Memorandum Art. 2(b).

23 Joint Statement Art. 2(b).

24 AB Report EC-Sardines, para. 153.

25 See below Chpt. IV.6.

first time a panel accepted *amicus* briefs incorporated in a party's submission *prima facie* as an integral part thereof, only twenty-one *amicus* cases have reached the WTO's judicial bodies. These disputes led in total forty-five *amici* to file a brief either with a panel or the AB. However, only eight of them have been taken into account as part of a regular party's submission, while only an additional two contributed to the panel's consideration independently. Unsolicited briefs directed at the AB, on the other hand, have so far not been regarded as helpful.²⁶

As nearly all of these cases involved developing countries as either parties to the dispute or as third parties, they will in the following serve to examine whether the opposition of less affluent Member States against *amici* has also in substance been “much ado about nothing” – or: whether *amici curiae* are in fact *inimici* of developing countries. The only *amicus* dispute not to be taken into account concerned Australia's import prohibition on certain salmon, which constituted one of two cases where the panel accepted independent *amicus* briefs;²⁷ although they did not quote them directly, the panelists regarded explanations forwarded by ‘Concerned Fishermen and Fish Producers’ on why Australia treated imports of salmon differently from imports of pithards (MAREAU 2001) as helpful in rendering their decision.

The following section will deal with the remaining cases by dividing them into different categories which refer to the kind of interests represented by the *amici*. Having determined the latter with the aid of the actual briefs or the goals and motives stated by the respective organization, ‘environmental’, ‘public health’ and ‘business or industrial’ cases as well as one touching ‘rights of indigenous people’ will be examined. A last category has not been established according to the type of concerns voiced externally, but is set apart since it unites cases unveiling systemic problems related to *amici curiae*. An overview of the disputes pertaining to a particular category is provided at the beginning of every subsection, whereby the regular parties as well as the *amici* will also be named. In addition, a comprehensive list of all relevant cases is provided in Annex A.

26 WTO, HANDBOOK 2004. It is claimed that the AB accepted in preliminary ruling on *US-Shrimp/Turtles* at least one *amicus* submission that was not attached to a Member's submissions (HOWSE 2003b). However, this brief has not been mentioned in the AB's report nor quoted in the literature as the AB's first acceptance of an independent brief. Moreover, it is not known what kind of organization should have filed it.

27 For a brief review of the case for instance: (SANDS 2003).

4.2 Environmental Stakes: The Shrimp/Turtle Cases

Table 1: *Amici curiae* in the environmental cases

Cases	Parties to the Dispute	<i>Amici curiae</i>
<i>US-Shrimp/Turtle</i> WT/DS58/R, 15 May 1998	India, Malaysia, Pakistan and Thailand vs. the U.S.	In favour of the respondent: • WWF • Coalition led by CMC and CIEL
<i>US-Shrimp/Turtle</i> WT/DS58/AB/R, 12 October 1998	U.S. as appellant; India, Malaysia, Pakistan and Thailand as joint appellees	In favour of the appellant: • the Humane brief • Coalition led by CMC and CIEL • WWF and FIELD
<i>US-Shrimp</i> (Art. 21.5 – Malaysia) WT/DS58/RW, 15 June 2001	Malaysia vs. the U.S.	In favour of the respondent: • Coalition led by the Earth Justice Legal Defense Fund • Coalition led by the National Wildlife Federation
<i>US-Shrimp</i> (Art. 21.5 – Malaysia) WT/DS58/AB/RW, 22 October 2001	Malaysia as appellant; the U.S. as appellee	In favour of the appellant: • American Humane Society and Humane Society International Position unknown: • Prof. ROBERT HOWSE

At the beginning of the first *amicus* case stood, ironically, an organization that would also be part of one of the first *amicus* coalitions (SHAFFER 1999): Had not the Earth Island Institute compelled the U.S. administration to apply section 609 of Public Law 101–162, a law regulating the harvest of shrimp in U.S. American waters, to all shrimp exporting countries, the WTO's judicial bodies would not have rendered their second decision in an environmental case that early after Dolphin/Tuna (SANDS 2003). While the law itself obliged shrimp trawl vessels to use turtle excluder devices (TEDs), section 609 extended its scope by prescribing an import ban on shrimp harvested by means that might harm sea turtles. In order to prevent such a ban, exporting countries had to obtain in negotiations a certification declaring that they disposed of a regulatory programme comparable to the U.S. in order to protect sea turtles. As the U.S. did not even contact them for negotiations, India, Malaysia, Pakistan and Thailand were adversely affected by the United States' turtle protection regime and thus felt forced to challenge it before a panel.

On the opposing side, they saw themselves not solely confronted with the U.S., but also with coalitions of NGOs that had filed briefs highlighting the environmental dimension of the case. In the panel proceedings, the United States incorporated the briefs both by the Worldwide Fund for Nature (WWF) and by a coalition led by the U.S.-based Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL), a university-based legal group. Before filing its actual brief, the latter had already stressed the need for the WTO to admit *amicus curiae* in a motion (CIEL, 2005). It was the same coalition that also lobbied by a letter to President Clinton to appeal the panel's decision, which declared the U.S. policy inconsistent with the WTO regime. In its appeal as well as in the second phase of the Shrimp/Turtle dispute in 2001, when Malaysia unsuccessfully challenged the revised guidelines (DE LA FAYETTE, 2003), the United States again integrated the factual and legal information provided by *amicus* into its own submission.²⁸

However, deducing from this approach that the *amicus* were in essence mere advocates of U.S. interests would be wrong: although, e.g., the first briefs by the WWF and the CIEL coalition expressed similar opinions regarding the procedural questions, meaning the admittance of *amicus* briefs, and the legal interpretation of the disputed Art. XX GATT (CIEL 1999),²⁹ the United States repeatedly stated that it did not wholly endorse the position stated in the briefs.³⁰ Accordingly, the dispute settling bodies only took those parts of the briefs into account which were identical with the defendant's position, thereby reducing them to a repetition of U.S. arguments. Retrospectively, the complainants', later the appellee's as well as several third parties' opposition to the briefs appeared only justified from a systemic point of view.

None of the complainants or appellees was confronted with the opposition of an *amicus* operating under its own jurisdiction. The only exception was India as a third party and proponent of Malaysia's position in its recourse to Art. 21.5 DSU: four Indian based NGOs³¹ had joined the Na-

²⁸ Panel Report US-Shrimp (Art. 21.5 – Malaysia), para. 5.15; AB Report US-Shrimp (Art. 21.5 – Malaysia), para. 77.

²⁹ For a summary of the briefs: HERNÁNDEZ-LÓPEZ.

³⁰ AB Report US-Shrimp/Turtle, paras. 90–91; Panel Report US-Shrimp (Art. 21.5 – Malaysia), para. 5.15; AB Report US-Shrimp (Art. 21.5 – Malaysia), para. 77.

³¹ Marine Turtle Preservation Group of India, National Wildlife Federation, Operation Kachhapu, Project Swarajya and the Visakha Society for Prevention of Cruelty to Animals. With the exception of the first group, the location of these groups has been found out on their respective websites.

tional Wildlife Federation's coalition whose brief had been incorporated into the submission of the USA – India's erstwhile opponent.

4.3 A Public Health Case: The EC and NGOs v. Asbestos Imports

Table 2: The *amici* in the Asbestos cases

Cases	Parties to the Dispute	<i>Amici curiae</i>
EC-Asbestos WT/DS135/R, 18 September 2000	Canada vs. the EC Relevant third parties: Brazil and Zimbabwe	In favour of the applicant: - the Instituto Mexicano de Fibras-Industrias A.C. In favour of the respondent: - Collegium Ramazzini - the American Federation of Labor and Congress of Industrial Organizations - both incorporated into the EC's submission - Ban Asbestos Network - ONE (Only Nature Endures)
EC-Asbestos WT/DS135/AB/R, 5 April 2001	Appeal both by Canada and the EC Relevant third party: Brazil	(11 submissions – cf. Annex A)

While Shrimp/Turtle had only drawn the interest of environmental protection or advocacy organizations, groups representing a myriad of interests, ranging from the already acquainted NGOs to public health associations, church groups and chemical trade associations attempted to contribute to the proceedings launched by Canada against a French import ban of asbestos and products containing all forms of this supposedly carcinogenic substance (WIRTH 2002). Already the panel was confronted with five *amici* submission, whereof one originating from an Indian environmental NGO, Only Nature Endures (ONE), was rejected as untimely.³² While the defendant, the EC, found the briefs filed by a group of experts and a labour interest organization as reflecting its own arguments and therefore incorporated them into its submission,³³ another brief in support of its position was not taken into consideration.³⁴ Likewise, the scientific and legal opinion of the Instituto Mexicano de Fibras-Industrias

A.C., due to the latter's goals (PERRON 2002) supposedly in favour of the complainant, was not regarded as helpful.³⁵

In view of the decision rendered by the panel, no party could claim itself victorious: although the French measure was considered an exception pursuant to Art. XX(b) GATT, the panel nonetheless declared it a violation of the national treatment obligation, since it regarded legally available substitutes as 'like' products (HOWSE 2003a; WIRTH 2002). As a consequence, Canada appealed the decision regarding the interpretation of Art. XX(b) GATT as well as the panel's interpretation of the TBT Agreement, while the EC cross-appealed the construction of 'likeness' – which had also caused indignation among representatives of public health association and other opponents of asbestos. As ROBERT HOWSE (2003a), professor of international trade law and thrice submitter of an *amicus* brief to the WTO, put it:

"It is fairly obvious that, from the ethical perspective of protection of human life and health, the suggestion that products proven to have killed thousands of victims are 'like' those with no such track record is outrageous." (S. 504)

Sensing that a substantive number of entities might desire to express similar or contrary views, the AB prescribed in its Additional Procedure under what circumstances leave would be granted to *amici* briefs.³⁶ A majority of briefs sent in by Asbestos producers located in developing countries already failed to be accepted due to inconsistency with the procedural requirements.³⁷ Of those seventeen requests for leave submitted after the publication of the Additional Procedure, another six were rejected as untimely and the remaining ones were turned down without further explication – the AB merely referred to lacking compliance with the requirements.³⁸

Both in the panel and the AB proceedings, the interests of Zimbabwe and Brazil as third parties³⁹ were thus not adversely affected by the potential *amici*: on the one hand, groups defending the views of both sides sought access to the dispute; on the other hand, even HOWSE as a potential friend

³⁵ Panel Report EC-Asbestos, para. 8.12.

³⁶ See above Chpt. 2.3.

³⁷ AB Report EC-Asbestos, para. 53 fn. 30.

³⁸ AB Report EC-Asbestos, paras. 55–56.

³⁹ Zimbabwe appeared only in the panel proceedings as third party.

³² Panel Report EC-Asbestos, para. 8.14.

³³ Panel Report EC-Asbestos, para. 6.2.

³⁴ Panel Report EC-Asbestos, para. 8.12.

of the Court doubted that any *amicus* could have contributed arguments going beyond the party submissions (Howse 2003a). Still the way the AB dealt with the briefs, i.e. the publication of an Additional Procedure, was subject to harsh criticism by developing countries, which considered that as an overstretch of the judges' mandate.⁴⁰

4.4 Rights of Indigenous People: The Softwood Lumber Dispute

Table 3: The *amicus* in the Softwood cases

Cases	Parties to the Dispute	<i>Amici curiae</i>
US-Preliminary Determinations Softwood Lumber, WT/DS236/R, 27 September 2002	Canada vs. the U.S. Relevant third party: India	In favour of the respondent: • Interior Alliance
US-Final CVD Softwood Lumber, WT/DS257/R, 29 August 2003	Canada vs. the U.S. Relevant third party: India	In favour of the respondent: • Indigenous Network on Economies and Trade • joint brief filed by a coalition led by Defenders of Wildlife
US-Final CVD Softwood Lumber, WT/DS257/AB/R, 19 January 2004	Appeal both by Canada and the U.S. Comments by India	In favour of the U.S.: • Indigenous Network on Economies and Trade • joint brief filed by a coalition led by Defenders of Wildlife
US-Investigation Softwood Lumber, WT/DS277/R, 22 March 2004	Canada vs. the U.S.	In favour of the respondent: • Northwest Ecosystem Alliance

Other than in Asbestos or Shrimp/Turtle, the nexus between the more than twenty years lasting Softwood Lumber disputes (DFAIT 2005b; MINISTRY OF FORESTS, GOVERNMENT OF BRITISH COLUMBIA 2002) and the interests voiced by external parties is anything but obvious: between the United States and its Northern neighbour evolved a dispute about the Canada's provincial and federal forest management regimes. With the expiration of the 1996 Lumber Trade Agreement in 2001, a five year long interlude free of conflict likewise ceased and the dispute reached the WTO. Considering Canada's export restriction and some province's particularly

low stumpage fees (ALI, SACCOCCIO, THOMPSON 2005)⁴¹ as countervailable subsidies, the U.S. reacted to a petition launched by the Coalition for Fair Lumber Imports by imposing countervailing and anti-dumping duties on Canadian softwood lumber (DFAIT 2005b). Canada challenged these measures before the WTO and thereby saw the American lumber industry supported by two unexpected *amicus*: in two of five Softwood Lumber cases the Indigenous Network on Economies and Trade submitted its opinion and in the second dispute the Interior Alliance.⁴²

As the name of the former suggests, the aides were associations defending the rights of indigenous people. Their intervention in a case that at first glance seems to be a solely economic matter becomes comprehensible by the Interior Alliance's submission, which has been taken into consideration by the panel without its being incorporated in a party's submission. The Interior Alliance claimed that harvesting companies were only able to beat the market price because of British Columbia's refusal to redistribute a share of the revenue gathered from them to indigenous people. Thus the Canadian lumber industry not only profited from low stumpage rates, but already the non-recognition of aboriginal land rights had the effect of a subsidy under international trade law. As a consequence they called on the panel to:

"Maintain the present trade remedies necessary to restore fair competition and ensure that fundamental conditions for fair trade such as environmental protection and the recognition of indigenous rights, especially Aboriginal Title, be respected and met by the Canadian government and Canadian forest companies in the future." (ICTDS 2002)

Albeit its supporter, the United States rejected the Interior Alliance's interpretation, since it considered the question of traditional land rights better to be addressed domestically (GASTLE 2002). The panel itself did not quote or refer to the brief in its decision, but explained that harvesting companies were taking 'on a number of obligations in addition to paying' the actual fee under provincial stumpage contracts, which has been interpreted as a reference to Aboriginal rights (MANUEL 2002).

⁴¹ Stumpage fees are charged "to logging companies for the right to harvest lumber from public land."

⁴² Panel Report US-Final CVD Softwood Lumber, para. 7.1 fn. 75; AB Report US-Final CVD Softwood Lumber, para. 9; Panel Report US-Preliminary Determinations Softwood Lumber, para. 7.2. Of the five Softwood Lumber cases only four led to *amicus* submissions (cf. Annex A). An overview of all five cases and their outcome can be found at DFAIT, 2005b).

⁴³ Panel Report US-Preliminary Determinations Softwood Lumber, para. 7.18.

⁴⁰ See above Chpt. 3.2.

India, as the only developing country involved as a third party, did not issue any opinion on it, but focused on the legal questions raised by the two parties, whereby it backed the Canadian standpoint.⁴⁴ In the remaining Softwood Lumber cases involving unsuccessful *amici curiae* submissions in support of the U.S. claim,⁴⁵ however, it raised its voice against the acceptance of briefs in general.⁴⁶

4.5 Business Interests: Defending Barriers to Trade

Table 4: *Amici* involved in business cases

Cases	Parties to the Dispute	<i>Amici curiae</i>
US-Lead and Bismuth II WT/DS138/R, 23 December 1999	The EC vs. the U.S. Relevant third parties: Brazil and Mexico	In favour of the respondent: • American Iron and Steel Institute (AISI)
US-Lead and Bismuth II WT/DS138/AB/R, 7 June 2000	The U.S. as appellant; the EC as appellee Relevant third parties: Brazil and Mexico	In favour of the appellant: • AISI • Specialty Steel Industry North America
US-Countervailing Measures on Certain EC Products WT/DS212/AB/R, 9 December 2002	The U.S. as appellant; the EC as appellee Relevant third parties: Brazil and India	In favour of the appellant: • AISI
US-Definitive Safeguard Measures on Steel WT/DS248-259/AB/R, 10 November 2003	The U.S. as appellant; <i>inter alia</i> Brazil and Korea as appellees	In favour of the appellant: • AISI
US-Section 110(5) Copyright Act WT/DS160/R, 15 June 2000	The EC vs. the U.S. Relevant third party: Brazil	In favour of the respondent: • Association of Singers, Composers, Authors and Publishers (ASCAP)
EC-Bed Linen WT/DS141/R, 30 October 2000	India vs. the EC	In favour of the appellant: • Foreign Trade Association (FTA)

⁴⁴ Panel Report US-Preliminary Determinations Softwood Lumber, paras. 5.46-5.55.

⁴⁵ The briefs themselves have not been published, but their general tendency is clear given the nature and activities of the NGOs involved: all of them are part of the "Transborder Conservation Project" (TRANSBORDER CONSERVATION PROJECT 2005) and have signed a letter directed to U.S. Special Ambassador Marc Racicot, wherein they stated their opinion (BC COALITION 2002; NRDC 2002).

⁴⁶ Panel Report US-Final CVD Softwood Lumber, paras. 5.54-5.56; AB Report US-Final CVD Softwood Lumber, para. 42.

Besides spokesmen of environmental, public health or aboriginal concerns, also representatives of industry and business tried to reach the WTO's judicial bodies as *amici curiae*: the American Iron and Steel Institute (AISI), which comprises 31 member companies and 116 associate and affiliate members linked to the steel industry, tried to act as the 'voice of the Northern American steel industry'⁴⁷ in four cases concerning the U.S. steel regime (Aisi 2005). In addition, the Brussels based Foreign Trade Association (FTA) tried to intervene in the Bed Linen dispute between the EC and India, while the American Society of Composers, Authors and Publishers (ASCAP) submitted a brief in the US-Section 110(5) Copyright Act case.

ASCAP's submission was unsuccessful: the EC had claimed that a section of the U.S. Copyright Act, which exempted certain retail and restaurant establishments from paying royalties for radio or TV music, violated the TRIPS Agreement (USTR 2005). On certain questions raised by the panel thereto, the United States Trade Representative (USTR) asked ASCAP's legal advisors for their opinion, which was then considered as useless to the dispute by the defendant as well as by the complainant.⁴⁸

The AISI's first attempt to reach the panel in US-Lead and Bismuth II failed due to untimeliness,⁴⁹ but in the appeal its brief as well as the one filed by the Specialty Steel Industry North America⁵⁰ were discussed by the parties and third parties. Both briefs argued in favour of U.S. countervailing duties on steel exports, which had been imposed on British company due to the terms applied for its privatisation (PRÉVOST 2001). Hardly surprising was the outright rejection of these *amici* opinions by the third parties Mexico and Brazil.⁵¹ firstly, the two countries were and still are generally opposed to *amici* submissions, and, secondly, they supported the EC's complaint both before the panel and the AB, referring to the detrimental effect of the U.S. practice on their own privatisation programmes. Although the AB once more stressed its competence to consider *amici* contributions deemed helpful, it again renounced to do so.⁵² Of the other two relevant cases pertaining to U.S. steel policy, a nearly identical picture can be drawn: in the appeal on US-Countervailing

⁴⁷ The figures were taken from the homepage; in the *amici* brief to the panel in US-Lead and Bismuth II CEO Sharkey spoke of 48 members and 178 affiliate and associate members.

⁴⁸ Panel Report US-Section 110(5) Copyright Act, paras 6.4-6.5.

⁴⁹ Panel Report US-Lead and Bismuth II, para. 6.3.

⁵⁰ AB Report US-Lead and Bismuth II, para. 36.

⁵¹ AB Report US-Lead and Bismuth II, para. 37.

⁵² AB Report US-Lead and Bismuth II, para. 37.

Measures on Certain EC Products, the U.S. declared that it did not intend to incorporate the AISI's brief into its own submission, but that it nonetheless agreed with it in most its aspects,⁵³ whereas India and Brazil as third parties probably agreed neither with its contents nor its admission.⁵⁴ Similarly, in US-Definitive Safeguard Measures on Steel the appellee Brazil was supported by Latin American third parties in its opposition against the AISI brief, which was finally not taken into consideration.⁵⁵

While AISI and ASCAP both defended the interests of their 'home country', the United States, the EC-Bed Linen case shows that this does not always have to be that way in cases pertaining to industrial interests (STERN 2003). Naturally, comparing the *amicus* in this panel procedure to the two interest organizations is not admissible, since the Foreign Trade Association (FTA) engages not for specific interests, but for 'a free world trade and the liberal development and strengthening of the multilateral trading system within the framework of the WTO' (FTA 2001).

Bearing that in mind, it is less surprising that a European NGO should support a developing country like India in a judicial conflict with the EC: the latter had applied anti-dumping measures against importations of textile products made in India, which were challenged as inconsistent with the Anti Dumping Agreement. However, the FTA's supporting brief was not taken into consideration by the panel, not even the parties commented on it,⁵⁶ although one could speculate on India's traditionally outright rejection of the submission.

⁵³ AB Report US- Countervailing Measures on Certain EC Products, para. 76.

⁵⁴ The AB states in its report that the third parties could not agree on a common position regarding the *amicus* brief (para. 76 fn. 172). However, as India and Brazil sided with the EC in this dispute and in general firmly oppose submissions of external parties, it is permissible to assume their rejection of the brief in this case.

⁵⁵ AB Report US-Definitive Safeguard Measures on Steel, para. 268.

⁵⁶ Panel Report EC-Bed Linen, para. 6.1 fn. 10.

4.6 Systemic Issues: Breaches of Confidentiality and Third Party Rights

Table 5: *Amici* in cases revealing systemic problems

Cases	Parties to the Dispute	<i>Amici curiae</i>
<i>Thailand-H-Beams</i> WT/DS58/AB/R, 12 March 2001	Thailand as appellant; Poland as appellee	In favour of the appellee: • Consuming Industries Trade Action Coalition (CITAC)
<i>EC-Sugar</i> WT/DS265-266/R, WT/DS283/R (Thailand), 15 October 2004	Brazil, Thailand and Australia vs. the EC	In favour of the respondent: • Wirtschaftliche Vereinigung Zucker (WVZ)
<i>EC-Sugar</i> WT/DS265-266/AB/R, WT/DS283/AB/R, 28 April 2005	The EC as appellant; Australia, Brazil and Thailand as appellees	In favour of the appellees: • Central American Sugar Industries
<i>EC-Sardines</i> WT/DS231/AB/R, 26 September 2002	The EC as appellant; Peru as appellee Relevant third parties: Chile, Ecuador and Venezuela	In favour of the appellant: • Professor ROBERT HOWSE ¹ Positions unknown: • Morocco

Although a categorization of Thailand-H-Beam, EC-Sugar and EC-Sardines could also follow the previous pattern, these three cases are set apart for revealing problems connected to *amicus* submissions that go beyond legal questions regarding the AB's mandate or the resistance of Member States: the first two cases showed the risks of the dispute settlement's desired 'openness', whereas the third highlighted possible conflicts of rights and duties between third parties and *amici*.

In Thailand-H-Beams and EC-Sugar, Thailand as appellant and Brazil as one of two complainants found confidential information disclosed to external parties: when asked to express its opinion on the brief of a U.S. association, Thailand not only pointed out the AB's lacking authority to consider such a submission, but also a 'potentially more serious issue'⁵⁷ linked to it. Specifically, the Consuming Industries Trade Action Coalition's (CITAC) brief contained references to arguments made by Thailand in its submission, indicating that this organization had obtained access to these confidential information. Thailand alleged that Poland or a third party must have 'failed to treat Thailand's submission as confiden-

⁵⁷ AB Report Thailand-H-Beams, para. 63.

tial and had disclosed it to CITAC, in violation of Articles 17.10 and 18.2 DSU".⁵⁸

Moreover, Thailand observed that the law firm representing the appellee Poland also maintained a close connection with CITAC, suggesting that it might have passed on the contents of Thailand's submission to CITAC.⁵⁹

Reacting to the AB's inquiries, neither the third parties⁶⁰ nor Poland could explain the leak of information: the latter replied that while there was a connection between the law firm acting as its legal counsel and CITAC, that firm had not assisted CITAC in preparing its *amicus* submission and that neither the Polish government nor members of the law firm could explain how CITAC came to refer so specifically to Thailand's brief.⁶¹ Consequently, the AB emphasized in its preliminary ruling the importance of Art. 17.10 and 18.2 and officially rejected CITAC's *amicus* brief, but declined the appellant's request to issue a direct inquiry to CITAC, as it was not a party to the case.⁶²

Three years later, Brazil detected in a brief filed in support of the EC's export subsidies on sugar 'that there was evidence that a breach of confidentiality had occurred'⁶³ with respect to certain information provided in the *amicus* submission. Supported by the other complainants, Thailand and Australia, Brazil urged the panel to investigate how the breach could occur. Not able to discern the source of the *Wirtschaftliche Vereinigung Zucker* (WVZ),⁶⁴ the panel decided not to take the submission into account since it regarded it as 'evidence of a breach of confidentiality which disqualifie[d] the credibility of the authors'.⁶⁵

On appeal, an *amicus* brief filed in favour of the appellees caused less disturbances: the Association of Central American Sugar Industries' brief was found unnecessary to be taken into account.⁶⁶

⁵⁸ AB Report Thailand-H-Beams, para. 64.

⁵⁹ AB Report Thailand-H-Beams, para. 65.

⁶⁰ AB Report Thailand-H-Beams, paras. 69–73.

⁶¹ AB Report Thailand-H-Beams, para. 72.

⁶² AB Report Thailand-H-Beams, paras. 74–78.

⁶³ Panel Report EC-Sugar (Brazil), para. 7.76.

⁶⁴ Panel Report EC-Sugar (Brazil), paras. 7.80–7.85.

⁶⁵ Panel Report EC-Sugar (Thailand), para. 7.82.

⁶⁶ AB Report EC-Sugar, para. 9.

While the external intervention in the above cited cases would have been to the detriment of the participating developing countries, the standpoint taken by the *amicus* in EC-Sardines has not been accessible. Although the European Communities as appellant were eager to accept the brief filed by Morocco, it is not clear whether the EC did so to gather helpful information or simply to further promote *amicus* briefs as a procedural means (STERN 2003). As has already been discussed above,⁶⁷ the submission of the Kingdom of Morocco stirred a debate less due to its potential contents than for the mere fact of its acceptance by the AB.⁶⁸ Peru, the appellee in the case, argued that the appearance of a Member as *amicus* constituted a circumvention of the DSU's third party rules. This view was shared by a majority of developing countries, most prominently by the Latin American Members, since they had witnessed Colombia being denied third party status (COVELLI 2003; Dispute Settlement Body 2002; ZIMMERMANN 2004).

5 Whose Friend, Whose Foe? – Concerns Analysed

5.1 Power Issues and Systemic Concerns in the Past Cases

In light of the twenty-one cases taken into consideration, one is again compelled to ask: have the concerns of developing countries against *amicus* briefs indeed been, using once more MAVROIDIS' (2002) reference to Shakespeare, "much ado about nothing." Have developing countries only cried wolf or have they taken the role of Cassandra, foreseeing adversary consequences for the dispute settlement procedure as a whole?

The following sections shall, on the one hand, seek responses to concerns related to 'power issues', namely fears connected to the kinds of organizations that tried to intervene and their motives to do so. Thereby it will be inquired whether *amici* have turned out less to be friends of the Court than friends of the West and Western business interests. On the other hand, it shall be focused on systemic issues, i.e. questions regarding changes in the character of the WTO's dispute settlement procedure and a potential imbalance of rights between Member States and external parties. But, initially, it will be dealt with 'fear number one': the floodgate argument.

⁶⁷ See above Chpt. 3.3.

⁶⁸ AB Report EC-Sardines, paras. 164–167.

5.2 Primary Fear: The Floodgate Opened?

An 'unmanageable number of requests' (MAVROIDIS 2002),⁶⁹ a flood of *amicus* briefs had been expected by Mexico if the gates were opened for external parties to express their opinion on certain aspects of a dispute. But already at a special session of the DSB in November 2003, Chairman Péter Balás noted a discrepancy between expectations and fact: at that time, *amicus curiae* briefs had been submitted in just nine per cent of all cases, respectively fifteen times, whereby in thirteen of these cases Members had raised the issue of *amicus* briefs at DSB meetings (DSB 2003d). During the past two years, the relevant caseload augmented by only six disputes, thus to 45 *amicus* briefs. As has already been explained,⁷⁰ of those ten that had been taken into account by panels or the AB, only two had not been incorporated into a party's submission. Thus the parties were forced to answer to the points raised by these *amici*, but that did not necessarily increase the workload of the developing countries participating in those disputes: the successful submission of 'Concerned Fishermen and Producers of Southern Australia' in Australia-Salmon did not concern any developing country, whereas the opinion of the Interior Alliance in US-Preliminary Determinations Softwood Lumber was not even commented on by India, a third party in that dispute. Even in cases where one party included a brief into its own submission, the remaining participants had not to give further consideration to it, as the former often declared only those points of a brief as relevant that coincided with its own views.⁷¹

The gap between expectations of a flood of briefs and the reality of their rare appearance and little influence can partly be explained by the deterring practice of the AB: the way it handled the submissions to EC-Asbestos had not only irritated Member States, but also those entities that had filed a brief in accordance with the Additional Procedure. Its rejection of all *amicus* contributions has been preceded by a convention of the General Council which ended with the Chairman admonishing the judges to deal cautiously with the issue (UMBRICHT 2005, WIRTH 2002; ZIMMERMANN 2004). Thus potential friends of the Court finally knew neither under what circumstances their voice would be heard nor to what extent the AB bended to external pressure. Obviously, procedural questions concerning external submissions which remain unanswered pose a problem

69 Quoting from the Minutes WTO Doc. WT/GC/M/60 of 23 January 2001.

70 See above Chpt. 4.1.

71 See above Chpts. 4.2 and 4.5.

to both Member States and *amici curiae*: the lack of transparency and of defined rules can deter an entity to file a brief, as it cannot evaluate its chances for success and therefore might prefer to avoid a financial and procedural risk.

But, more importantly, the defenders of the floodgate argument also base their expectations on false assumptions: as HOWSE (2003a) explains:

"This fear was largely a product of ignorance of *amicus* practice before other courts and how it evolved – which is that in practice courts, whether municipal or international, end up accepting only a few briefs, with most submissions rejected on grounds of lack of relevance." (S. 504)

This observation, however, does not hold for the Latin American coalition: even though they share a civil law culture,⁷² and neither the Arbitral Tribunal of the Mercosur admits external submissions (MARCEAU 2001) nor mentions the Statute of the Tribunal of the Andean Community *amicus* briefs,⁷³ they are well acquainted with *amici curiae* – at the Inter-American Court of Human Rights. Without disposing of an unambiguous legal basis nor further commenting on the admissibility of *amicus* briefs, the Court has developed what Shelton termed 'the most extensive *amicus* practice' (SHELTON 1994; MARCEAU 2001) at the international level, in contentious jurisdiction as well as in advisory proceedings. Thereby it was never confronted with the resistance marked by Latin American countries against the acceptance of briefs at the WTO (BUERGENTHAL 1985).⁷⁴ In sum, this coalition of opponents was and is well aware of the *amicus* practice of an international court, but with a practice that runs counter to the experiences referred to by HOWSE.

Transposing this experience to the WTO level entails a misperception of the nature of disputes drawing the attention of potential *amici*: the Inter-

72 HOWSE (2003a) has not referred to the example of the Inter-American Court of Human Rights in context of the floodgate argument, but to disprove the often heard opinion that the main resistance of developing countries against *amici* roots in a "clash of legal cultures" (UMBRICHT 2005). Developing countries themselves did not forward this argument, but Mexico spoke of an illegitimate preference for common law practice when commenting on the Methanex and UPS decisions, the two NAFTA cases in which the tribunals admitted *amicus* briefs (BJORKLUND 2002).

73 The Tribunal of the Andean Community has not been covered in the comparative analyses of MARCEAU and SHELTON. The "Estatuto del Tribunal de Justicia de la Comunidad Andina" does not mention *amicus* briefs and searching the online-database of judgements did not produce any hits for *amici curiae*.

74 Also ten years after Buergenthal's publication, Shelton does not report any protests against the Court's acceptance of external briefs.

American Court of Human Rights deals with questions pertaining to essential societal issues; the domestic court with the most extensive *amicus* practice, the U.S. Supreme Court, receives briefs in more than half of all non-commercial cases *amicus* briefs, most prominently in environmental cases (SHELTON 1994). In contrast, the WTO's dispute settling bodies do not regularly deal with issues of social or environmental concern (HOWSE 2003a), such as genetically modified organisms (GMO) or asbestos. Accordingly, the panel's and the AB's decisions rarely draw major public attention and thus will not very likely be confronted with a comparable development.

5.3 Power Issues: *amicus curiae* as Friends of the West?

Setting aside that the WTO Members have been spared a flood of briefs, the question remains whether those entities that submitted their opinion were mainly located in Western countries, as suspected by most developing countries. A first glance at the overview of *amicus curiae* provided in Table 6 confirms this expectation: hardly a third of all *amicus* were based in a developing country, whereof nine did not even file their brief independently, but relied in US-Shrimp/Turtle and EC-Asbestos on coalitions of NGOs under Western leadership.⁷⁵ However, this record would be bended in favour of entities located in developing countries, had the many asbestos producers – ranging from firms in Swaziland to Korea – not filed their briefs at a stage where the Additional Procedure had not yet been published. Accordingly, their submissions did not comply with the AB's requirements and had to be disregarded by the judges.⁷⁶

Moreover, while Western *amicus* do in fact dominate the current picture, they cannot be regarded as a developing country's adversaries and their home country's natural allies. In cases touching upon environmental or public health issues, *amicus curiae* can indeed be termed as foes of developing countries – meaning their governments – as NGOs operating in these fields have defended conservatory policies they consider necessary, but which violate WTO agreements. At the domestic level, however, the same entities regularly represent interests that conflict with their government's programme: these NGOs engage for global issues and are not mere advocates of any government. Congruence between their goals occurs only at

⁷⁵ With regard to US-Shrimp/Turtle this has also been observed by STERN 2003.

⁷⁶ See above Chpt. 4.3.

an *ad hoc* basis. Accordingly, many NGOs appear as litigants or *amicus curiae* against the governments under whose jurisdiction they stand. In a letter sent to President Clinton after the panel's ruling in US-Shrimp/Turtle, e.g., the cooperating NGOs not only expressed their support for the U.S. policy, but also underlined that they would favour an even stricter approach.

Table 6: Categorization of *amicus curiae*

Type of <i>amicus</i> / Interests Represented:	Number of <i>amicus</i> briefs filed:	Thereof Located In a Developing Country:	Number taken into consideration:
Member State	1	1	0
Individual	3	0	0
Group of Experts	4	1	1 (incorporated)
Environment	14 ¹	2 independently; 9 as part of a joint brief	6 (incorporated)
Public Health	3	0	0
Industrial/Trade Interests	14	3	1
Labour Interests	1	0	1 (incorporated)
Indigenous People	3	0	1
Other	2	0	0
In Total:	45	16	10

At the WTO level, examples for *amicus* that have not appeared as friends of their State constituted the European FTA and the Canadian Interior Alliance. More interestingly, though, the same could be witnessed in the case of NGOs operating solely in developing countries: as has already been observed,⁷⁷ in US-Shrimp/Turtle Indian environmental organizations supported the U.S. standpoint and thereby underlined that a government's opinion does not necessarily coincide with the one held by civil society. Depending on the accessibility of a country's political system, *amicus curiae* could provide a means for representatives of specific interests to voice their opinion which otherwise might remain unheard.

⁷⁷ See above Chpt. 4.2.

5.4 Power Issues: *amici curiae* as Friends of Business?

Affluent and influential as they already are at domestic level, business associations were feared to exercise additional pressure in the WTO dispute settlement procedures as *amici curiae*. PRÉVOST (2001) even asserted that parties to a dispute would mainly include briefs filed by business associations and thus further strengthen these organizations. Contrary to these concerns, Table 6 shows that business interests were not predominant, as becomes even more poignant if one considers that of these fourteen briefs nearly a third had been filed by the American Iron and Steel Institute alone.

Like in the case of the faulty floodgate argument, this counterintuitive result can only be explained by the fact that *amici* opponents again based their argument on a wrong, though not disclosed assumption: that business associations or corporations have no other possibility to defend their interests than by *amici* submissions. Yet in the United States as well as in the EC, they are granted a more efficient means by law (STOIBER 2004): the 1974 U.S. Trade Act allows private entities to complain against alleged breaches of trade agreements, which might lead to WTO procedures. Similarly, pursuant to the EC's Trade Barriers Regulation of 1994, a petition can be filed with the Commission to investigate the admissibility of barriers to trade. If obligations under the WTO have indeed been violated by a State and if it lies in the interest of the European Communities to set an end to this situation, the Commission will ask for consultations according to the DSU. Thus it is far more effective for a European or U.S. defender of corporate interests to file a complaint with the Commission, respectively with domestic authorities, whose consideration is granted by law, rather than submit an *amici* brief that can easily be disregarded. However, sometimes the domestic petitioning efforts involuntarily lead to a dispute before the WTO: the U.S. Coalition for Fair Lumber Imports, as has been told before,⁷⁸ had successfully lobbied for countervailing duties against Canadian softwood lumber – which ultimately led to a complaint against the U.S. In the series of cases pertaining to that conflict, the named organization never appeared as an *amici*.

In addition to these legal means, corporations and business associations also know more discreet ways to reach dispute settlement circles, most prominently by lobbying efforts. Given their experience and resources to

78 See above Chpt. 4.4

access the WTO dispute settlement world without the risk of being openly turned down like most *amici*, Howse (2003a) remarked that:

“The idea that the *amici* procedure would be captured by these kinds of interests, or would largely benefit them is close to absurd. Why walk through the front door, when you can go through a key-hole?” (S. 509)

5.5 Systemic Issues: Imbalance of Rights and Obligations?

Less obvious are the answers to concerns relating to changes in the dispute settlement system due to *amici* contributions. Member States feared that, by admitting external briefs, the inter-governmental character of the WTO would be threatened and private entities would be granted participatory rights without corresponding obligations. However, this perception is to be refuted by reference to the AB's rulings: although external parties have the possibility to file briefs to both instances, there is no right to having them considered by the judges. In contrast, third parties are bound to certain procedural obligations, but in exchange, their opinion must be heard and considered by either panel or AB.⁷⁹ Moreover, only Member States enjoy *locus standi* before the dispute settling organs of the WTO.

The admittance of *amici* briefs filed by Member States in EC-Sardines should, theoretically, further weaken, if not nullify the argument that external entities received more rights than regular Members. In that particular dispute, however, a Member State was indeed put at a disadvantage as the status of *amici* was commonly regarded as reserved to private entities: while Colombia tried to reach the AB on the habitual path, i.e. as a third party, but was refused this status, Morocco circumvented these regulations and appeared as an *amici*.⁸⁰ Thus Colombia was deprived of the possibility to make its position known, whereas a private individual's opinion was taken notice of. The fact that the two briefs accepted were not taken into consideration does not compensate Colombia's foregone opportunity to forward its arguments.

For the future, however, the situation has been clarified and States like Colombia now dispose of another means to make their standpoint known.

79 See above Chpt. 2.2.

80 See above Chpts. 3.3 & 4.6.

It has even been suggested that *amicus* participation might provide a cost-effective way for less affluent States to participate in the proceedings (HOWSE 2003a). But before we could speak of *amicus* briefs as 'cost-effective', the conditions under which a brief is successful, i.e. effective, should be laid down by either the DSB or the AB. In the meantime, States, and particularly States with few resources at their disposal, will probably avoid the risk of filing their arguments like other potential *amici*.⁸¹

Regarding further categories of potential *amici*, only one question remains to be raised:⁸² whether non-Member States likewise have a right to submit their arguments. Particularly States that are already trying to acquire membership might have an interest to state their opinion in disputes potentially affecting their future position. In view of the AB's and the panel's current case law, nothing speaks against a non-Member's *amicus* intervention. Politically, however, it seems not advisable for a State involved in accession talks to express its opinion on a case and thereby possibly offend its negotiating partners – an argument which might counterbalance the non-Members' interest in intervening and thus render the overall likelihood of such a brief very small.

Equally pertaining to the question of an imbalance of rights between external parties and Members are confidentiality issues: such an asymmetry could indeed be observed if private entities were able to access confidential submissions or information about the substantial meetings between judges and parties to a dispute. Both party submissions and meetings remain, however, inaccessible for external parties. Up to this point, one could agree with HOWSE (2003b) that the admittance of *amicus* briefs is structurally not incompatible with confidential proceedings.⁸³ However, experience has shown that there indeed exists a link between questions of confidentiality and *amici*, since the latter have already undermined confidentiality rules in two cases: the Thailand-H-Beams as well as the EC-Sugar cases will not render it easier for panels to establish 'equality of arms' (EHLERMANN 2002) between disputing parties by motivating them to make available all information used in their defence. Why should one disclose confidential information to an opponent, if the latter might pass it on to external parties?

81 See above Chpt. 4.2.

82 This question has, to my knowledge, not been posed in the literature.

83 He reiterated this opinion in HOWSE (2003a).

In addition, the two cases showed how reasonable the AB's Additional Procedure in *Asbestos* has been to require *amici* to disclose any affiliation to a party.⁸⁴ That these breaches of confidentiality have been to the detriment of the *amicus curiae* institution as such, was poignantly stated by the competent panel:

"The Panel regrets [the] refusal [of the *amicus* WVZ] to cooperate [by disclosing its source] which, regardless of the merits (or lack thereof) of WVZ submission, undermines not only elemental fairness to the parties, but also compromises the integrity of the dispute settlement system itself by hindering further openness and the transparency of the dispute settlement process."⁸⁵

Therefore it had to be prevented that *amici* are rendered a mere instrument of the parties (STERN 2003). In the two cases mentioned, panel and AB rejected the briefs whose information based on breaches of confidentiality. But to prevent further incidences of this sort, clear rules in the manner of the Additional Procedure should be established. These should also address the question on how confidential the *amicus* submissions themselves shall remain. Currently, some NGOs publish their *amicus* briefs while the adjudicating bodies have not yet rendered their decision and thus provide the wider public with their opinion. And if further breaches of confidentiality occur, they might even spread information that was never destined for anyone else but the dispute settling circles.

5.6 Systemic Issues: Legal Disputes Turning Political?

Latin American countries not only saw the inter-governmental character of the WTO as threatened by *amicus* briefs, but also legal disputes turned into political debates.⁸⁶ They argued that NGOs would try to change the focus of a dispute by putting the emphasis on social or environmental aspects. Contradicting this argument right away is not possible for a very trivial reason: on the international level, it can hardly be distinguished between purely legal and political disputes.

At domestic level, the U.S. Supreme Court has formulated a 'political questions doctrine' which allows it to refuse decisions that might lead to a

84 Additional Procedure para. 3(g).

85 Panel Report EC-Sugar (Australia), para. 7.83.

86 Quoting from the Minutes WTO Doc. WT/GC/M/60 of 23 January 2001.

conflict with political institutions (DAVEY 2003). In contrast, the International Court of Justice (ICJ) never declined to decide a case considered by critics as purely political conflicts. (MAVROIDIS 2002):⁸⁷ while it did frequently declare itself only concerned with legal questions of a dispute which are to be abstracted from the surrounding political aspects (DAVEY 2003; SHAW 2003), the Court did not provide any guidance on how to distinguish between political or legal questions.

Similarly, the WTO's adjudicating bodies have been accused of interfering in political issues in two cases: in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial and in Turkey – Restriction on Imports of Textile and Clothing Products* they were confronted with questions that should have been settled by political organs of the WTO, but were stuck in a political impasse (DAVEY 2003; EHRLERMANN 2002, HOWSE 2003b). Even though, according to EHRLERMANN, panel and AB regarded these respective disputes to be addressed more suitably by the competent Committees, they could not decline to render a decision as this would have been contrary to Art. 3.2 DSU.

Yet to justify the refusal of a political questions doctrine at the WTO, reference to the DSU is not essential: the observations made for and by the ICJ are also valid for disputes before WTO panels or the AB – political issues are often, if not always entwined with the legal question at disposition. In international law in general as well as in international trade law, the legal kernel of a dispute can be discerned, but that cannot change the perception of a dispute as inherently political. Thus a dispute is not politicised due to *amicus* submissions, it is rather its inherent political nature that leads NGOs and other entities to engage as *amici*. Cases leading to many *amicus* submissions are already subject to a political debate before NGOs try to make themselves heard: public awareness of cases like the pending GMO dispute is high, as they pertain to problems unresolved at domestic level.

In the judicial proceedings, parties might try to highlight the political sensitivity of an issue, by adding political or ethical rather than unambiguously legal arguments. But their impact is marginal, as has already been indicated above: a dispute settling body does not see its role in settling political, but legal disputes and thus filters submissions for their legal ar-

⁸⁷ Cf. for instance the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, which was often criticised for dealing with a merely political question [Advisory Opinion of 8 July 1996, ICJ Reports 1996, pp. 226].

guments. As a consequence, NGOs filing a brief do often use their appearance as a forum to 'sell their message' (MAVROIDIS 2002) and to nourish a public debate, but it lies not in their force to prevent the judges to filter their arguments and thus deprive proceedings of their legal nature.

6 Summary and Conclusion

"Much ado about nothing?" – this question has guided the analysis of the WTO's *amicus* cases. In the course of this examination, it has been argued that

- the judicial bodies and the parties to a dispute have not been exposed to a flood of *amicus* briefs, because WTO disputes do not always concern issues that rank high in the public awareness and thus stir the interest of NGOs.
- business associations have not dominated the *amicus* submissions, since they dispose of more discreet and effective ways to reach dispute settling circles.
- although it were mostly Western organizations which filed briefs, they did not necessarily defend the interests of their home country: NGOs engaging for social and environmental issues stand for global concerns and thus often pursue their interests in opposition to their respective governments.
- an imbalance of rights between external parties and regular Members does not exist at the latter's disadvantage, since both are entitled to file briefs *amicus curiae* and only Members enjoy locus standi as well as access to confidential meetings and information.
- disputes are not politicised by *amicus* briefs, since it is their inherent political nature and domestic importance that leads NGOs to submit their arguments. Cause and effect have obviously been reversed by those holding this concern.

Thus an unambiguous yes or no cannot be given as an answer, instead it has to be opted for a 'yes, but': yes, many concerns have proven ungrounded. Neither have we witnessed an unmanageable flood of submissions filed by entities defending the affluent Western business world, nor saw we Member States put at a disadvantage in comparison to potential *amici*. Likewise, we cannot speak of a major influence exercised by external parties; disputes before the WTO's judicial bodies are as political or non-political as they have always been in cases drawing public interest. Hence *amicus* briefs cannot be regarded as a main deterrent for the participation

of LDCs, and certainly not for the participation of developing countries that are comparatively affluent like India.

But: we indeed saw problems caused by *amicus* submissions. Parties leaking confidential information to external entities do imperil the character of the WTO's dispute settlement system which still does not equal a purely judicial procedure, but includes a strong diplomatic element depending on mutual trust between the parties. These breaches of confidentiality as well as the legal uncertainty on the side of both *amici* and Member States can only be addressed by adopting clearly defined rules as the AB did in EC-Asbestos. However, the latter need to be agreed upon by the Dispute Settlement Body and thus by all Member States. This has so far not been possible, as the *amicus* debate is also a reflection of the divide between affluent developed countries eager to make the dispute settlement more accessible and developing countries that have even in the light of the *amicus* record not recoiled from their position.

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Annex A: Overview of Relevant Cases

The following table provides an overview of all relevant cases ordered chronologically according to the date of the decision, thereby showing

- which developing countries had participated in the dispute,
- what entities had filed a brief *amicus curiae*,
- and whether these briefs had been taken into consideration by either panel or AB.

The overview has been made with the aid of

- Worldtradelaw.net
- WTO.org

PANEL				
Case (Short title, dispute settlement number and date of the decision)	Developing countries involved	Number of <i>amicus</i> briefs	Thereof taken into consideration	<i>Amici curiae</i>
US-Shrimp/Turtle WT/DS58/R, 15 May 1998	India, Malaysia, Pakistan and Thailand as complainants; Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Hong Kong, Mexico, Nigeria, the Philip- pines, Senegal, Singapore, Sri Lanka and Venezuela as third parties	2	1 (as part of the US submission)	• WWF • Center for Marine Conservation and the Center for International Environmental Law
US-Lead and Bismuth II WT/DS138/R, 23 Dec. 1999	Brazil and Mexico as third parties	1	0 (untimely)	• American Iron and Steel Institute (AISI)
Australia-Salmon WT/DS18/RW, 18 February 2000	—	1	1	• "Concerned Fishermen and Processors" in South Australia.
US-Section 110(5) Copyright Act WT/DS160/R, 15 June 2000	Brazil as a third party	1	0	• law firm representing ASCAP
EC-Asbestos WT/DS135/R, 18 Sept. 2000	Brazil and Zimbabwe as third parties	5 (thereof 1 untimely)	2 (included by the EC into its own submission)	• Collegium Ramazzini • the American Federation of Labor and Congress of Industrial Organizations → both incorporated into the EC's sub- mission • Ban Asbestos Network • the Instituto Mexicano de Fibrro-Industrias A.C. • ONE (Only Nature Endures) situated in Mumbai, India
EC-Bed Linen WT/DS141/R, 30 October 2000	India as respondent; Egypt as third party	1	0	• Foreign Trade Association

PANEL					
Case	Developing countries involved	Number of <i>amicus</i> briefs	Theroot taken into consideration	<i>Amici curiae</i>	
US-Shrimp (Art. 21.5 – Malaysia) WT/DS58/RW, 15 June 2001 (number and date of the decision)	Malaysia as complainant; Thailand and Hong Kong, China Ecuador, India, Mexico, Pakistan, as third parties	2	1 (The National Wildlife Federation Sub-mission as part of the sub-missions of the United States)	- Earth Justice Legal Defense Fund ① - National Wildlife Federation ②	
US-Preliminary Determinations Softwood Lumber, WT/DS236/R, 27 Sept. 2002	India as a third party	4 (3 thereof ultimately)	1	- Interior Alliance, Canada (remaining ones not named in the case)	
US-Final CVD Softwood Lumber WT/DS257/R, 29 August 2003	India as a third party	3	0	- Indigenous Network on Economies and Trade (Vancouver, British Columbia, Canada) - joint brief filed by Defenders of Wildlife (Washington, D.C., United States), Natural Resources Defense Council (Washington, D.C., United States) and Northwest Ecosys-tem Alliance (Bellingham, state of Washing-ton, United States)	
US-Investigation Softwood Lumber, WT/DS277/R, 22 March 2004	Korea as third party	1	0	Northwest Ecosystem Alliance	
EC-Sugar WT/DS265/R (Australia), WT/DS266/R (Brazil), WT/DS283/R (Thailand), 15 October 2004	Brazil and Thailand as complainants; Barbados, Belize, Brazil, China, Colombia, Côte d'Ivoire, Cuba, Fiji, Guyana, India, Jamaica, Kenya, Madagascar, Malawi, Mauritius, Paraguay, Saint Kitts and Nevis, Swaziland, Tanzania, Thailand, Trinidad and Tobago as third parties.	1	0 (breach of confidentiality)	Wirtschaftliche Vereinigung Zucker (WVZ), an association representing German sugar producers	

APPELLATE BODY					
Case	Developing countries involved	Number of <i>amicus</i> briefs	Theroot taken into consideration	<i>Amici curiae</i>	
EC-GMO DS291; DS292; DS293 (Short title, dispute settlement number and date of the decision)	Argentina as a complainant; Chile, China, Chinese Taipei, Colombia, El Salvador, Honduras, Peru, Thailand and Uruguay as third parties.	3	(pending dispute)	- Coalition of 15 interest groups ③ - Joint brief by Center for International Environmental Law (CIEL), Friends of the Earth – United States (FOE – US), Defen-ders of Wildlife, Institute for Agriculture and Trade Policy (IATP), Organic Consumers Association – United States (OCA – USA) - Trans-atlantic group of expert academics	
PENDING CASE					
Case	Developing countries involved	Number of <i>amicus</i> briefs	Theroot taken into consideration	<i>Amici curiae</i>	
US-Shrimp WT/DS58/AB/R, 12 October 1998 (number and date of the decision)	India, Pakistan and Thailand as joint appellees; Malaysia as appellant; Ecuador, Hong Kong, China and Nigeria as third parties	3	3 (as part of the US submission)	- the Earth Island Institute; the Humane Club - Society of the United States; and the Sierra - the Center for International Environmental Law (CIEL); the Center for Marine Conser-vation; the Environmental Foundation Ltd.; the Mangrove Action Project; the Philippine Ecological Network; Red Nacional de Accion Ecologica; and Sobrevivencia - the Worldwide Fund for Nature and the Foundation for International Environmental Law and Development.	

APPELLATE BODY				
Case	Developing countries involved	Number of amicus briefs	Thereof taken into consideration	Amici curiae
US-Lead and Bismuth II WT/DS138/AB/R, 7 June 2000 (Short title, dispute settlement number and date of the decision)	Brazil and Mexico as third parties	2	0	- American Iron and Steel Institute - Specialty Steel Industry North America
Thailand-H-Beams WT/DS58/AB/R, 12 March 2001 (Short title, dispute settlement number and date of the decision)	Thailand as appellant	1	0 (Breach of confidentiality)	- Consuming Industries Trade Action Coalition (CITAC) - Andrew G. Sharkey III, American Iron and Steel Institute President & CEO
US-Countervailing Measures on Certain EC Products WT/DS212/AB/R, 9 Dec. 2002 (Short title, dispute settlement number and date of the decision)	Brazil and India as third parties	1	0	- Robert Howse (United States) - Occupational & Environmental Diseases Association (United Kingdom) - American Public Health Association (United States) - Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina) - Only Nature Endures (India) - Korea Asbestos Association (Korea) - International Council on Metals and the Environment and American Chemistry Council (United States) - European Chemical Industry Council (Belgium) - Australian Centre for Environmental Law at the Australian National University (Australia) - Associate Professor Jan McDonald and Mr. Don Anton (Australia) - Joint application from Foundation for Environmental Prof. Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban
EC-Asbestos WT/DS135/AB/R, adopted 5 April 2001	Brazil as a third party	11 on time	0	Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland).

APPELLATE BODY				
Case	Developing countries involved	Number of amicus briefs	Thereof taken into consideration	Amici curiae
US-Shrimp (Art. 21.5 – Malaysia) WT/DS58/AB/RW, 22 Oct. 2001 (Short title, dispute settlement number and date of the decision)	Malaysia as appellant; Hong Kong, China, India, Mexico and Thailand as third parties	2	1	- American Humane Society and Humane Society International - Prof. Robert Howse
EC-Sardines WT/DS231/AB/R, 26 Sept. 2002	Peru as appellee; Chile, Ecuador and Venezuela as third parties	2	0	- Morocco - Prof. Robert Howse
US-Definitive Safeguard Measures on Steel WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, 10 Nov. 2003	Brazil, China and Korea as appellees; Cuba, Mexico, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Thailand and Venezuela as third parties	1	0	American Institute for International Steel
US-Final CVD Softwood Lumber WT/DS267/AB/R, 19 Jan. 2004	India refused to participate as a third party, but commented on the admissibility of amicus briefs in its oral statement.	2	0	- Indigenous Network on Economies and Trade (Vancouver, British Columbia, Canada) - Joint brief filed by Defenders of Wildlife (Washington, D.C., United States), Natural Resources Defense Council (Washington, D.C., United States) and Northwest Ecosystem Alliance

APPELLATE BODY				
Case	Developing countries involved	Number of amicus briefs	Therap taken into consideration	Amici curiae
EC-Sugar WT/DS265/AB/R (Australia), WT/DS266/AB/R (Brazil), WT/DS283/AB/R (Thailand), 28 April 2005 (number and date of the decision)	Brazil and Thailand as appellees; Barbados, Belize, China, Colombia, Côte d'Ivoire, Cuba, Fiji, Guyana, India, Jamaica, Kenya, Madagascar, Malawi, Mauritius, Paraguay, St. Kitts & Nevis, Swaziland, Tanzania and Trinidad & Tobago as third parties	1	0	Central American Sugar Industries

- ① On behalf of the Turtle Island Restoration Network, the Human Society of the United States, the American Society for the Prevention of Cruelty to Animals, Defenders of Wildlife, and the Fiscalía Del Medio Ambiente (Chile).
- ② On behalf of the Center for Marine Conservation, Centro Ecosociales, Defenders of Wildlife, Friends of the Earth, Kenya Sea Turtle Committee, Marine Turtle Preservation Group of India, National Wildlife Federation, Natural Resources Defense Council, Operation Kachhap, Project Swanjya, Visakha Society for Prevention of Cruelty to Animals.
- ③ GeneWatch UK, Foundation for International Environmental Law and Development (FIELD), Five Year Freeze, Royal Society for the Protection of Birds (RSPB), The Center for Food Safety, Council of Canadians, Polaris Institute, Grupo de Reflexión Rural Argentina, Center for Human Rights and the Environment (CEDHA), Gene Campaign, Forum for Biotechnology and Food Security, Fundación Sociedades Sustentables, Greenpeace International, Californians for GE-Free Agriculture, International Forum on Globalisation

Annex B: Additional Procedure

Adopted by the Appellate Body for *EC-Asbestos* (WT/DS135/9, 8 November 2000).

1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.
 2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body by noon on Thursday, 16 November 2000.
 3. An application for leave to file such a written brief shall:
 - (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
 - (b) be in no case longer than three typed pages;
 - (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
 - (d) specify the nature of the interest the applicant has in this appeal;
 - (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;
 - (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and
 - (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this

dispute in the preparation of its application for leave or its written brief.

4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.
5. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.
6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat by noon on Monday, 27 November 2000.
7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:
 - (a) be dated and signed by the person filing the brief;
 - (b) be concise and in no case longer than 20 typed pages, including any appendices; and
 - (c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the
- (d) Panel Report with respect to which the applicant has been granted leave to file a written brief.
8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute by noon on Monday, 27 November 2000.
9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure. (original emphasis)